No. 1170

IN THE

Supreme Court of the United States

October Term, 1964

HOWARD PRICE D/B/A HOWARD PRICE AND COMPANY

Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND WILSON H. WARD, AS DIRECTOR OF THE CONSTRUCTION DIVISION, STATE ROAD COMMISSION OF WEST VIRGINIA

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

STATEMENT OF THE CASE

The complaint shows, and for jurisdictional purposes here, as well as on Motion to Dismiss in the Trial Court, it must be taken as true, *Ickes* v. *Fox*, 300 U.S. 82, 96, that by arbitrary action of the State Road Commissioner, under color of office and without authority, the Road Commission wrongfully abrogated Appellant's interstate highway construction contract, put him off the project and refused to

audit his claim for payment of $1.3 Million due under the contract for his work and materials incorporated in the public roadway. *This is the major thrust of Appellant's complaint.* Appellant's complaint was for a declaratory judgment wherein he sought to establish his rights, and sequentially to enforce them by compelling the Road Commissioner to perform his statutory duty. Appellees met Appellant's charges with a motion to dismiss on the ground that the proceeding was an action against the State of West Virginia and prohibited by Section 35, Article VI of the State Constitution. Appellant was turned out of the state courts without a hearing on that ground.

ARGUMENT

I.

APPELLEES ASSIGNED GROUNDS FOR DISMISSAL ARE WITHOUT MERIT AND ARE REFUTED BY THE RECORD

The grounds assigned by Appellees in support of their Motion to Dismiss are: (a) That the Federal questions sought to be reviewed were not timely or properly raised; and (b) that the state court did not expressly pass on the federal questions sought to be reviewed. *No further reference is made by Appellees to these grounds, and their motion is devoid of any reference to the record or any argument in support thereof.*

On the motion to dismiss in the Trial Court, no responsive pleading was allowed under the State Rules of Civil Procedure. The federal questions were raised by Appellant by argument in opposition to Appellees' motion to dismiss (Jurisdictional Statement, p. 7; Appendix H thereto, Order Certifying Existence of Federal Question, p. 28a). The *raising of* the federal questions is noted in:

(1) The Trial Court's opinion of November 7, 1963 (Jurisdictional Statement, p. 8; Appendix A thereto p. 6a);

(2) The final order of the Trial Court granting Appellees' motion to dismiss (Jurisdictional Statement p. 8; Appendix E thereto p. 22a);

(3) The Assignment of Errors contained in Appellant's Petition to the Supreme Court of Appeals of West Virginia (Jurisdictional Statement, p. 8); and

(4) The Trial Court's Order Certifying Existence of Federal Questions (Jurisdictional Statement, p. 9; Appendix H thereto, p. 28a).

The *passing upon* such federal questions by the Trial Court is evidenced by:

(1) The Trial Court's opinion;

(2) The Trial Court's final order granting Appellees' motion to dismiss; and

(3) Its Order certifying Existence of Federal Questions, all as referred to above.

We submit Appellees' assignment of supposed grounds for dismissal of this appeal is altogether without merit and is conclusively refuted by the record.

II.

APPELLEES' ARGUMENT OUTSIDE THE ASSIGNED GROUNDS IS EQUALLY WITHOUT MERIT

Without assigning any grounds as a basis therefor Appellees argue:

(1) That Appellant should have brought a mandamus proceeding *to require* the Road Commissioner to condemn his property in the public road under the State eminent domain statutes; and

(2) That "*in the event that Appellant is denied such a writ of mandamus*" (Motion to Dismiss, p. 9) then Appellant can present his claim to the Attorney General, *Appel-*

lees' counsel herein, requesting him, under the State statute to consider the claim, to the end he *may* recommend to the Legislature that Appellant's claim be recognized *as a moral obligation of the State,* and for the satisfaction of which the Legislature *may* make some appropriation.

1. Appellant Has Exhausted All Remedy in the State Court. The Trial Court's Dismissal was Not Based On Any Question of Appropriateness of Remedy but Upon the Application to the Case of the Immunity Provision of the State Constitution

But for the state's asserted immunity, Appellant's declaratory judgment proceeding was an appropriate remedy encompassing every procedural remedy available to Appellant. Rule 57 of the West Virginia Rules of Civil Procedure, entitled "Declaratory Judgments" (Jurisdictional Statement, Appendix D, page 20a), provides that "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Appellees' motion to dismiss in the Trial Court was not grounded on choice or appropriateness of remedy, but solely upon the Trial Court's *lack of jurisdiction* to afford any remedy to Appellant. The basis of the Trial Court decision in turn does not concern a choice of remedies, but *concerns whether any remedy is available to Appellant as against Appellees' interposition of the State's Constitutional immunity.* (Jurisdiction Statement, Appendix B, Letter Opinion of April 13, 1964, p. 16a). It is the application of this constitutional immunity provision to the facts of this case which raises the Federal questions. By the Trial Court's application of the immunity provision, Appellant can have no remedy whatsoever.

2. The Remedy By Mandamus, As Appellees Suggest Pro Hac Vice On This Motion to Dismiss, Has Already Been Ruled Upon By the Trial Court and Decided Adversely to Appellant

The Trial Court's opinion stated that as a declaratory judgment proceeding against a public official, this proceed-

ing was to be governed by the same rules governing mandamus. The Trial Court then considered it as such, and held that mandamus would not lie because it appeared there was a *"substantial controversy of fact"* (Jurisdictional Statement, Appendix B., Letter Opinion of April 13, 1964, p. 11a, 13a, 16a).

The only State decisions on mandamus applicable to the situation in the case at bar are *Draper* v. *Anderson,* 102 W.Va. 733, 135 SE 837, and *Black* v. *Fortney,* 108 W.Va. 41, 151 SE 319. *Both concerned claims by contractors against the State Road Commission and Road Commissioner as in the case at bar, and both turned on whether or not there was involved a "substantial controversy of fact." It was on the basis of these two decisions, that the Trial Court dismissed Appellant's action* (Judisdictional Statement, Appendix A, Letter Opinion of April 13, 1964, p. 7a). The Trial Court has accordingly already decided that mandamus will not lie.

Appellant notes that the Trial Court's ruling on Appellees' first motion to dismiss would have allowed Appellant to proceed as to his rights under the contract for the *work already performed and incorporated into the highway,* since at that point there was no *substantial controversy of fact* appearing on the pleadings. The Trial Court's ruling on the first motion precluded Appellant from further proceeding on items of relief *other* than eventual recovery for the work already performed and incorporated into the highway. It did so on the ground that such other relief involved discretion. With the passage of time such other relief became moot. *This holding on the relief requested and found to be discretionary is not involved in this appeal and was not involved on Appellees' second motion to dismiss. For the precise purpose of creating a "controversy of fact" on the pleadings and defeating Appellant's action considered as a mandamus,* Appellees filed their second motion to dismiss (almost verbatim their first motion) to which they attached

affidavits designed to show that a "controversy of fact" existed as to Appellant's work and materials incorporated in the highway. This was the only item on which Appellant remained in court after the rulings on the first motion and the only aspect of the case to be reached on the second motion to dismiss. Thus, in the light of the Trial Court's previous application of the constitutional immunity provision, Appellees precluded Appellant from further proceeding.

This action was instituted on May 24, 1963. It has been strenuously resisted by Appellees since the filing of the complaint. For almost a year the action was contested in the Trial Court upon Appellees' two motions to dismiss and various other and provisional pleadings, during all of which Appellees insisted upon the application to the case of the constitutional immunity provision as a *complete denial of any judicial remedy to Appellant. Now for the first time in this Court, Appellees suggest that Appellant should institute proceedings to require the Road Commissioner to institute eminent domain proceedings.* Appellees' own lack of faith in such suggestion is demonstrated by the statement in the Conclusion contained in their Motion to Dismiss (p. 9), that *"In the event that Appellant is denied such a writ of mandamus,"* then Appellant can present his claim as a moral obligation of the State.

The state statutes conferring the power of eminent domain upon the State Road Commission expressly pertain only to *real estate.* (Chapter 17, Article 2A, Section 8 (5), and Article 4, Section 5, Code of West Virginia, 1931, as amended; same, Michie's West Virginia Code of 1961, Serial Sections 1448 (8)(5) and 1461 respectively).

The four condemnation decisions of the West Virginia Supreme Court of Appeals, relied upon by Appellees (Motion to Dismiss, p. 4), all involve the *condemnation of real estate.* The case of *Priolo* v. *City of Dallas,* 234 SW 2d 1014 decided by the Texas Court of Appeals and cited by

Appellees for the proposition that a business is property for which recovery can be had under eminent domain, was *reversed* by the Supreme Court of Texas (240 SW 2d 761). The *Priolo* case is of extremely doubtful relevance to the case at bar, but in any event, the West Virginia case authority is in accord with the *reversal.* Appellees also rely on *Johnson* v. *United States,* 79 F. Supp. 208. It does not involve eminent domain, but concerns the salary of a Federal judge and the rights under the statute providing for it. It is inapplicable to both the case at bar and Appellees' suggestion. *There is no West Virginia authority, statutory or otherwise, which supports Appellees' suggestion and the eminent domain statutes are to the contrary.* The statutes relating to eminent domain and the procedure therefor are clearly tailored for determining the value of interests in land and not for a situation such as is presented by this case.

3. The United States Supreme Court Cases Cited By Appellees Have No Application to the Case At Bar

Appellees cite *Mellon Company* v. *McCafferty,* 239 U.S. 134 and *Phyle* v. *Duffy,* 234 U.S. 431 as authority for their suggestion. (Motion to Dismiss, p. 3). Neither of these decisions have any application to this case. In the *Mellon* case the appellant did not in the *first instance* seek relief through the administrative procedure set up by the State for the correction of erroneous tax assessments and which by appeal could culminate in the courts. Instead, he went *directly* into the courts and was refused relief on that ground.

In the *Phyle* case the petitioner had been refused a habeas corpus in the State Court on the ground that mandamus was the proper remedy. On appeal to the U.S. Supreme Court, the State Attorney General *unequivocally declared* (p. 441) that petitioner had an ample and clear remedy by mandamus. There was no authority, statutory or case, to the contrary, *and nothing in the state Court's opinion that was in conflict with the Attorney General's opinion* (p. 441). This Court dismissed the certiorari.

In both of these cases the defendants in the lower court raised the point of a procedural impropriety and the cases were decided thereon. *That is not the case at bar. The case at bar was decided on the application of the constitutional immunity provision to the action.* The Trial Court by applying the immunity provision, decided that it lacked jurisdiction except for a proceeding in mandamus to compel performance of a statutory duty, but that mandamus would not lie because there existed a "substantial controversy of fact", and that accordingly Appellant had no remedy.

The suggestion of mandamus by Appellees' Counsel, the State Attorney-General, *is conclusively contradicted by the Trial Court's own opinion and decision that mandamus would not lie.* (Jurisdictional Statement, p. 14; Appendix B thereto, Opinion of April 13, 1964, pp. 11a, 15a).

4. The Protection of Appellant By the Provision of the State Constitution Prohibiting the Taking of Private Property for Public Use Without Just Compensation, As Appellees Suggest Pro Hac Vice On This Motion to Dismiss, Has Already Been Ruled Upon By the Trial Court and Decided Adversely to Appellant

Appellees suggest that Appellant is protected by Section 9, Article III of the State Constitution prohibiting the taking or damaging of private property for public use. (Motion to Dismiss, p. 4). The protection of this provision in the State Constitution *was relied* upon by Appellant in the Trial Court in the arguments on the motions to dismiss. It is noted in Appellant's objections contained in the Order of Dismissal (Jurisdictional Statement, Appendix E, p. 22a). It was also raised in Appellant's Assignment of Errors (Record p. 31) contained in his petition for appeal to the Supreme Court of West Virginia (Jurisdictional Statements, p. 8).

The Trial Court has accordingly already ruled upon this suggestion and decided it adversely to Appellant.

5. Appellees' Suggestion of Presentation By Appellant of Claim to the Attorney General for Consideration and Possible Recommendation to the State Legislature As a Moral Obligation of the State Is Not a Judicial Remedy and Is No Substitute for Due Process of Law

Appellees suggest as a last resort, "in the event that Appellant is denied" a writ of mandamus (Motion to Dismiss, pp. 6, 9), he may pursue his claim under the State statute as a *moral obligation of the State.* (Chapter 14, Article 2, Code of West Virginia, 1931, as amended by Acts of the West Virginia Legislature, Regular Session 1953, Chapter 18; Michie's West Virginia Code of 1961, Serial Sections 1143 et seq.) It should be noted that the statute cited relating to claim procedure before the Attorney General expressly excludes any claim "7. With respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the State." (Motion to Dismiss, p. 8). Thus, *all other considerations aside, it is apparent that Appellees suggestion begs the question of whether Appellant should be provided a judicial forum in which to establish and enforce his rights.*

This statute provides for the presentation of claims to the State Attorney General, *who appears here as counsel for Appellees,* to consider and hear evidence, if need be, to the end he *may* recommend to the Legislature that a claim be recognized as a *moral obligation of the State,* and for which the Legislature *may* make some appropriation for its satisfaction.

It has been held insofar as Federal officials are concerned, that in the case of abuse of power of office, a claimant will not be relegated to a court of claims. *Land* v. *Dollar,* 330 U.S. 731, 738.

What Appellees are in essence suggesting is that Appellant *abandon the judicial forum* and submit the protection of his constitutional rights to the *whim and caprice of the political arena. This is no remedy at all.*

Appellant's constitutional right of due process and protection in his property is not to be so lightly treated. Constitutional rights are peculiarly within the sphere of judicial protection. A recommendation by the Attorney-General, in his discretion to be *made or denied*, for a legislative gratuity to be *given or withheld*, is not due process of law and not a substitute for the judgment of a court of justice.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

June 26, 1965

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